IN THE

United States District Court

FOR THE SOUTHERN DISTRICT OF NEW YORK

Civil No. 73-60

NEWTEX STEAMSHIP CORPORATION AND SEATRAIN LINES, INCORPORATED, *Plaintiffs*

v.

UNITED STATE OF AMERICA, ET AL., *Defendants.*

MOTION TO AFFIRM

Appellees, United States of America and Interstate Commerce Commission, pursuant to paragraph 3 of Rule 12 of the Revised Rules of this Court, move that the judgment of the district court be affirmed.

This is a direct appeal from the final judgment entered on October 3, 1952, by a district court of three judges constituted pursuant to 28 U.S.C. 2284 and 2325, dismissing an action to set aside an order of the Interstate Commerce Commission. The appeal was allowed on October 6, 1952, and the appeal papers were served on October 10, 1952.

Appellants are two water carriers authorized by the Interstate Commerce Commisson to engage in transportation of property between points along the Atlantic and Gulf coasts of the United States. The order of the Commission which appellants sought to have set aside granted to Pan-Atlantic Steamship Corporation, a competing common carrier by water, authority to serve Houston and Galveston, Texas, as an extension of its previously authorized operations between specified Atlantic and Gulf ports. The basic question which the appeal presents, as phrased in appellant's jurisdictional statement, is "whether the Commission in arriving at its ultimate conclusion made the same on the proper basic findings founded upon substantial evidence in the record before it."

The contested order of the Commission was issued pursuant to Section 309(c) of the Interstate Commerce Act, 49 U.S.C. 909(c). This section provides, so far as pertinent, that, upon application to the Commission for a certificate of public convenience and necessity to engage in transportation as a common carrier by water, the Commission may issue a certificate if it "finds that the applicant is fit, willing, and able properly to perform the service proposed * * * and that the proposed service, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity." The Commission explicitly made both of these requisite

findings. See *Pan-Atlantic Steamship Corporation Extension—Houston,* 285 I.C.C. 33, 50. And the district court held that these ultimate findings were "rationally supported by adequate basic findings" which had "substantial" evidentiary support.

It is settled that the Interstate Commerce Act does not require the Commission to make detailed findings of fact except in a case where damages are awarded and that the statute requires only that the Commission's report sufficiently disclose "the essential basis of its judgment." Alabama *Great Southern R.R.* v. *United States,* 340 U.S. 216, 227-228. In the present case the district court held that the Commission's report fully satisfies this test.

On the question of the applicant's fitness, willingness and ability, the Commission made findings with reference to adequacy of its financial position, equipment, facilities, experience and personnel (285 I.C.C. 33, 50; see also *id.,* 34-35). It also found that the applicant had shown "the ability to develop traffic to and from the Texas ports" (*id.,* 42). The Commission noted that the applicant had not performed all the service for which it had operating authority, but concluded that this circumstance "does not require the finding that applicant is not fit and willing to perform the operations for which it here seeks authority" (*id.,* 35-36). This was certainly a reasonable exer-

cise of administrative judgment since the applicant's failure fully to utilize its existing operating authority does not establish its unwillingness to perform the new service for which it sought operating authority. In this connection, the Commission was warranted in giving weight to the substantial and progressive increase in tonnage handled by the applicant in the post-war period (*id.*, 42).

The finding that public convenience and necessity requires the additional service authorized by the Commission's order was also supported by adequate basic findings which rested on substantial evidence. The Commission found that the service which had been rendered by the appellants was inadequate (285 I.C.C. 33, 46). It found that the service of appellant Seatrain Lines, Inc. does not meet the needs of shippers and receivers of goods which move in less-than-carload lots (*ibid.*). It found that shippers criticized the service of appellant Newtex Steamship Corporation upon the grounds that its sailings were "too infrequent" and "not regular," and that "its schedules are undependable" (*ibid.*). It found that Newtex provided "rather scant service" for certain ports and that "the hampering effects of such limited service has been aggravated by the repeated failure of Newtex vessels to sail on schedule and by the numerous outright cancellations of sailings" (*ibid.*).

On the question whether there was "room in the trade for another carrier" adequate subsidiary findings were made. The Commission found that in 1939 Houston had a population of 384,000 and nine coastwise sailings per week, while in 1950 it had a population of 594,000 but the coastwise service was limited to one sailing per week southbound and one sailing every two weeks northbound, although the rail traffic received and forwarded at Houston had risen from 6,000,000 tons in 1939 to 14,800,000 tons in 1949 (285 I.C.C. 33, 43). The Commission concluded that while prewar tonnage cannot be regarded as a true measure of the present traffic potential, that potential had not declined in the same proportion as the decline in coastwise service (*id.*, 49). It further found that appellant Seatrain's capacity or near capacity operations and its plan to put another vessel into operation showed that "more business is available or can be developed" (*ibid.*). It found, on the basis of the testimony of a number of shippers, that "a break-bulk line providing regular, dependable, and reasonable frequent sailings will engender confidence and reliance upon coastwise service and attract additional traffic" (*ibid.*). It also noted that the applicant's proposed service would result in service to the Texas ports by three water carriers as compared with eight prior to the war (*ibid.*).

As to the widespread view by trade and shipper organizations that there was public need for the proposed additional service and traffic available therefor, the Commission stated (285 I.C.C. 33, 42-43):

> Applicant's contentions with respect to the availability of traffic within the affected area and the public need for additional break-bulk water service are supported by the Boston Port Authority, Chamber of Commerce of Philadelphia, Rochester Chamber of Commerce, Shippers' Conference of Greater New York, Associated Industries of New York State, Inc., Houston Port and Traffic Bureau, Inc., Houston Chamber of Commerce, Galveston Cotton Exchange and Board of Trade, Galveston Chamber of Commerce, Board of Trustees of the Galveston Wharves, Fort Worth Chamber of Commerce, Fort Worth Grain & Cotton Exchange, Southwestern Peanut Shellers Association, Texas Cotton Seed Crushers Association, Texas Industrial Traffic League, and other shipper groups and individual shippers.

To the extent that the appeal attacks the Commission's order upon the ground that its findings are contrary to the weight of the evidence, the district court correctly held that the function of a reviewing court is to determine whether there is

"substantial evidence to support the basic findings." The court pointedly observed that the evidence referred to in the Commission report constitutes in itself substantial supporting evidence for its basic findings. Appellants have set forth nothing which would indicate error in the court's conclusion.

For the foregoing reasons, it is evident that this appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 458

NEWTEX STEAMSHIP CORPORATION AND SEATRAIN LINES, INCORPORATED,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STATEMENT BY APPELLEE, PAN-ATLANTIC STEAMSHIP CORPORATION, IN SUPPORT OF MOTION TO AFFIRM.

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Civil No. 73-60

NEWTEX STEAMSHIP CORPORATION AND SEATRAIN LINES, INCORPORATED,

Plaintiffs,

v.

UNITED STATES OF AMERICA, ET AL.,

Defendants

STATEMENT BY APPELLEE, PAN-ATLANTIC STEAMSHIP CORPORATION, IN SUPPORT OF MOTION TO AFFIRM BY UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION.

Comes now appellee, Pan-Atlantic Steamship Corporation, and files this its memorandum in support of Motion to Affirm the judgment of the district court, filed by United States of America and Interstate Commerce Commission. Pan-Atlantic Steamship Corporation is the carrier which is permitted by the Interstate Commerce Commission order here under attack to extend its previously authorized operations to the ports of Houston and Galveston, Texas.

In support of the aforesaid motion, appellee shows:

The Essential Position of Appellants Is Untenable

The district court found that

> "It is apparent that the plaintiffs' essential position is not that basic findings were made upon substantial evidence which are inconsistent with the ultimate conclusions, but that the basic findings made are precluded by the evidence. So stated, the problem upon review is merely whether there is substantial evidence to support the basic findings."

The appellants state in their jurisdictional statement that

> "The record of the proceeding before the Interstate Commerce Commission is replete with evidence adduced by the plaintiffs-appellants that the proposed new operation would not serve a useful public service; was not and would not be responsive to a public demand or need; that the purpose sought to be served by the proposed service could be and was being served as well by existing lines or carriers; and that the applicant's proposed service could not be operated without endangering or impairing the operations of existing carriers, contrary to the public interest."

The fact that appellants have included the foregoing in their jurisdictional statement indicates that they are proceeding under a basic misconception of the duties and functions of the courts in reviewing reports and orders of the Interstate Commerce Commission. Numerous decisions of the Supreme Court hold that it is the function of courts reviewing Commission decisions not to weigh the evidence that was before the Commission in proceedings brought to their attention, but to determine whether or not there was substantial evidence to support the Commission's ultimate

findings and conclusions. As the district court found, there was substantial evidence, specifically recited in the Commission's report, to support findings directly contrary to those urged with respect to each of the points referred to by appellants in the above quoted statement. Assuming *arguendo* that there was also evidence before the Commission to support the positions of appellants with respect to these points (which appellee unequivocally denies), the fact remains that it is not the function of the courts to weigh the conflicting evidence and determine which is the stronger. As the Supreme Court stated in *Claiborne-Annapolis Ferry Company* v. *United States*, 285 U. S. 382, 392,

> "We think there was enough evidence—*when material and conflicting we may not pass upon its weight*—to support the Commission's conclusion." (Emphasis added.)

In *Virginian R. Co.* v. *U. S.*, 272 U. S. 658, the court said, at page 663:

> "To consider the weight of the evidence before the Commission, the soundness of the reasoning by which its conclusions were reached, or whether the findings are consistent with those made by it in other cases, is beyond our province."

In *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, the court pointed out that it had theretofore "ascribed" to the findings of the Commission "the strength due to the judgment of a tribunal appointed by law and informed by experience," and also that in recognition of the Commission's expertise the court was led not to bind the Commission to common law evidential and procedural fetters. It then proceeded to summarize the limitations on

court review, as evolved from its previous rulings, as follows (p. 139):

> "From these general considerations the court evolved two specific doctrines limiting judicial review of orders of the Interstate Commerce Commission. One is the primary jurisdiction doctrine, firmly established in Texas & P. R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 51 L. ed. 553, 27 S. Ct. 350, 9 Ann. Cas. 1075. Thereby matters which call for technical knowledge pertaining to transportation must first be passed upon by the Interstate Commerce Commission before a court can be invoked. The other is the *doctrine of administrative finality.* Even when resort to courts can be had to review a commission's order, *the range of issues open to review is narrow. Only questions affecting constitutional power, statutory authority and the basic prerequisites of proof can be raised. If these legal tests are satisfied the Commission's order becomes incontestable.* Interstate Commerce Commission v. Illinois C. R. Co., 215 U. S. 452, 470, 54 L. ed. 280, 287, 30 S. Ct. 155; Interstate Commerce Commission v. Union P. R. Co., 222 U. S. 541, 56 L. ed. 308, 32 S. Ct. 108." (Emphasis added.)

Similarly, in *Interstate Commerce Commission* v. *Illinois C. R. Co.*, 215 U. S. 452, the court declined to substitute its judgment for that of the Commission or to pass upon the expediency or the wisdom of the Commission's order there involved. At page 470 of this decision, the following appears:

> "Plain as it is that the powers just stated are of the essence of judicial authority, and which, therefore, may not be curtailed, and whose discharge may not be by us in a proper case avoided, it is equally plain that such perennial powers lend no support whatever to the proposition that we may, under the guise of exerting judicial power, usurp merely administrative functions by setting aside a lawful administrative

order upon our conception as to whether the administrative power has been wisely exercised.

"Power to make the order, and not the mere expediency or wisdom of having made it, is the question."

The district court, in refusing to weigh the evidence before the Interstate Commerce Commission and in refusing to substitute its judgment for that of the Commission, acted within the proper scope and limitations of its judicial authority.

As the District Court Found, the Report of the Interstate Commerce Commission Read as a Whole Clearly Expresses the Essential Findings Necessary to Support Its Ultimate Conclusions

Appellants assert that the report of the Commission herein failed and refused to find that the existing coastwise services from and to Houston and Galveston, Texas, are inadequate; but, as a matter of fact, found to the contrary. Appellants also criticize the Commission's report for failing to find that the institution of service by the appellee, Pan-Atlantic Steamship Corporation, would endanger and impair the operations of the existing carriers, contrary to the public interest.

In the section of its report entitled "Discussion and Conclusions," the Commission reviewed and evaluated at length the considerations for and against the application of defendant-appellee, Pan-Atlantic. Instead of noting only those facts which supported its ultimate conclusions, the Commission's review and evaluation purposely and properly reflected full consideration of the contentions that had been advanced by each of the opposing parties. As the district court noted, the so-called "findings" that plaintiffs-appellants contend were made in its "Discussion and

Conclusions" by the Commission "are no more than pieces of the discussion surgically dissected from context."

The court found that *taken in context* the discussion in the Commission's report clearly expresses its findings and conclusions that (1) the existing service is inadequate, and (2) the proposed service will not endanger or impair the operations of existing carriers. With respect to point (1), the court's opinion makes reference to the definite and conclusive statements in the Commission's report that the existing services are inadequate, although the court notes that in all fairness the Commission's report also refers to the contrary evidence on the point. Likewise, the court refers to the Commission's discussion of whether there is room in the trade for another carrier, and points out that, except for isolated statements taken from context and labeled by appellants as "findings," the Commission's report has clearly conveyed the idea that the proposed service of Pan-Atlantic Steamship Corporation will not endanger or impair the operations of the carriers already in the trade. As the court stated, "To draw a contrary conclusion, in the light of the report, would be to indulge in a presumption that the Commission disregarded the public interest. Cf., *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515."

Appellants assert that the district court indulged in speculation and the drawing of inferences from negative facts, and even lack of evidence in the record, to justify the conclusions reached, specific reference being had to the Commission's findings with respect to the fitness and willingness of Pan-Atlantic to operate the proposed service. Contrary to appellants' contentions, however, the court specifically found that there is an "abundance of supporting evidence in the record" to support the Commission's finding that the applicant is fit, willing, and able to perform

its proposed service, and noted specific references in the Commission's report to Pan-Atlantic's adequacy of financial position, equipment, facilities, experienced personnel and record of past operations in the coastwise trade. (285 I. C. C. 33, 50) Appellants have contended that because Pan-Atlantic does not exercise all of the operating authority which it holds from the Commission, it can not be found to be fit and willing to exercise the particular authority now sought. However, the district court noted that the Commission had considered this argument and found that it did not require the finding that applicant is not fit or willing to perform the operation for which it here seeks authority. As the court said, "Though phrased negatively, the statement is nevertheless a finding of fitness and ability, if not upon its face, then at least by reasonable implication, and certainly when read in context. Nor is this finding precluded by the record."

For the foregoing reasons, and for those set forth in Motion to Affirm filed by appellees United States of America and Interstate Commerce Commission, it is evident that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the district court should be affirmed.

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Dated: November 12, 1952.